IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

MONDAY, THE 22ND OCTOBER 2007 / 30TH ASWINA 1929

TRC.No. 414 of 2002

(ORDER DATED 15-6-2002 IN TA.NO.59/2002 OF SALES TAX APPELLATE TRIBUNAL, THIRUVANANTHAPURAM.)

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REVISION PETITIONER/APPELLANT:

A. BAIJU,
SHAJU BAKERY,
KEDARAM SHOPPING COMPLEX,
KESAVADASAPURAM,
THIRUVANANTHAPURAM.

BY ADV. SRI.N.MURALEEDHARAN NAIR
SRI.MANOJ KUMAR.M
SRI.V.K.SHAMSUDHEEN

RESPONDENT/RESPONDENT:

STATE OF KERALA.

BY SR.GOVERNMENT PLEADER SRI.MUHAMMED RAFIQ.

THIS TAX REVISION CASE HAVING BEEN FINALLY HEARD ON 22/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

H.L.DATTU, C.J. & K.T.SANKARAN, J.

T.R.C.No.414 of 2002

Dated, this the 22nd day of October, 2007

ORDER

H.L.Dattu, C.J.

The revision petitioner is a dealer registered under the provisions of the Kerala General Sales Tax Act, 1963 ('the Act' for short). He is engaged in selling bakery products. According to the assessee, he effects purchases of the bakery products from one 'Appu's Bakers', Nanthencode and his sales are second sales and therefore, they are exempt from payment of sales tax. The claim of the assessee for exemption from payment of sales tax had initially been granted by the assessing authority.

(2) The shop premises of the assessee was inspected by the Intelligence wing of the Department. On such inspection, they had found suppression of purchases and sales of bakery products. It was also found that the assessee effected sales of bakery products under a brand name or a trade mark.

(3) Based on the report of the Intelligence wing of the Department, the assessing authority has reopened the assessment by issuing a pre-assessment notice incorporating the omissions pointed out by the Intelligence wing of the Department after conducting an inspection of the business premises of the petitioner/assessee. The assessee had filed his objections to the pre-assessment notice. The assessing authority has completed the assessment by holding that the assessee effected sales of the bakery products under a brand name or a trade mark, and therefore, exigible for payment of sales tax under sub-section (2) of Section 5 of the Act. While coming to the aforesaid conclusion the assessing authority in its order of assessment passed, has

stated as under:

> "The above proposal was duly communicated to the assessee and he filed reply as read above. Regarding the issue of brand name sale, assessee has admitted that he has printed the name and address of his bakery on the covers used for packing. Besides the name and address of the bakery the cover specify the particular variety of the commodity packed in it. These specifications are sufficient for sale of goods under Brand name. Moreover the first seller has not remitted any amount towards sales tax, because she is not liable to pay tax on the sales to brand name holder."

(4) Aggrieved by the quantification of the tax liability made by the assessing authority, the assessee had preferred appeal before the first appellate authority in S.T.A.No.675 of 2001. The first appellate authority by its order dated 23.1.2002 has rejected the assessee's appeal and in that once again observed as under:

> "The case of the appellant in appeal is that different varieties of cakes sold in covers printed with the name and address of the appellant cannot be treated as goods sold under brand name. But this issue was examined by the assessing authority in detail during the course of assessment and was decided against with the observation that the specification of the packing admitted are sufficient enough to treat the goods sold as sold under brand name. The appellant in appeal has produced nothing on record to rebut the findings of the assessing authority in this case. The observations made by the assessing authority on this point hold good and is therefore confirmed."

(5) The assessee thereafter had carried the matter by way of second appeal before the Sales Tax Appellate Tribunal in T.A.No.59 of 2002. The Tribunal once again has examined the issue whether the petitioner has sold the bakery products under the brand name and therefore exigible for payment of sales tax under Section 5(2) of the Act. The Tribunal in its order has observed as under:

> "We have examined the facts of the case and the arguments put forward by both parties in detail. On

> verification of the account the assessing authority has found that the appellant has purchased cakes and other bakery products from Appu's Bakers, Nanthencode, during the year 1999-2000 amounting to Rs.4,27,079.90 and claimed exemption on the sales turnover of the above purchase being second sales. The assessing authority refused the claim of exemption reasoning that the appellant has sold the goods under his brand name and as per Section 5(2) of the KGST Act, goods under a brand name sold by a brand name holder within the State shall be first sale. The assessing authority has, therefore, come to a conclusion that the sale on this account is exigible to tax and estimated the sales turnover by adding 10% towards the purchase value being gross profit and direct expenditure that forms the cost of purchase and the consequential deduction of sales turnover to determined was allowed on the conceded exempted turnover. The first appellate authority is seen to have confirmed the assessment as such. The learned Chartered Accountant in this context has argued that the appellant do not hold any brand name or trade name and so there is no justification in disallowing the exemption claimed by the appellant. We do not find any merit in this contention put forward by the learned Chartered Accountant. We find that the appellant has admitted that he has printed the name and address of his bakery on the covers used for packing. Besides, the name and address of the bakery the cover specify the particular variety of the commodity packed in it. In our opinion these specifications are sufficient for sales of goods under brand name and so, the assessment on this account and confirmed by the first appellate authority is in order. The said issue is, therefore, found against the appellant."

(6) Aggrieved by these findings and conclusions reached, the assessee is before us in this revision petition filed under Section 41 of the Act.

(7) The assessee has framed the following questions of law for our consideration and decision. They are as under:

> "1. Whether on the facts and in the circumstances of the case the Appellate Tribunal is correct in law in finding that the petitioner is liable to tax under Section 5(2) of the KGST Act merely because the goods are sold in printed cover?
>
> 2. Whether on the facts and in the circumstances of the case the Appellate Tribunal was correct in law in granting exemption only on 30% of the turnover towards bread and bun?

3. Whether on the facts and circumstances of the case the addition sustained by the Appellate Tribunal is reasonable?"

(8) Sri.Shamsudheen, learned counsel appearing for the assessee, would contend that the assessee is a second dealer in bakery products and therefore, he is exempted from payment of sales tax under the provisions of the Act. Elaborating this contention, learned counsel would submit that it is an admitted fact that the assessee would purchase the bakery products from one 'Appu's Bakers', Nanthencode and after such purchase, has wrapped the bakery products in a polythene cover and effected sales and if that is so the sale made by the assessee cannot be construed as sale made by a brand name holder or trade mark holder. Therefore, the assessing authority was not justified in invoking Section 5(2) of the Act to quantify the sales tax liability of the assessee.

(9) Learned counsel would further contend that the assessee has purchased from 'Appu's Bakers', Nanthencode who is also a registered dealer under the Act, and further they have paid sales tax for the assessment year in question and therefore, the assessee is entitled for reduction of the tax paid by the first seller while quantifying the tax liability of the assessee. In support of that contention the learned counsel has brought to our notice sub-rule (13B) of rule 32 of the Kerala General Sales Tax Rules, 1963.

(10) At the outset, we want to deal with the second point canvassed by Sri.Shamsudheen, learned counsel appearing for the assessee.

(11) The scope of revisional powers of this Court is limited. This Court can entertain a revision petition, if for any reason the Tribunal has failed to decide a question of law or has erroneously decided a question of law.

Secondly, what is not urged and argued before the Tribunal, for the first time cannot be canvassed before this Court.

(12) In the instant case, either before the assessing authority or before the Tribunal, it was not the case of the assessee that his seller who is also a registered dealer under the Act, has paid sales tax on the sales effected to the assessee and therefore, the amount of tax paid by him requires to be reduced while quantifying the tax liability of the assessee. Since this issue was not urged either before the assessing authority or before the Tribunal, in our opinion, the said question for the first time cannot be canvassed before us. The law on the point is now well settled by catena of decisions of this Court. Reiteration of those principles, in our opinion, is wholly unnecessary. Therefore, the second issue canvassed by the learned counsel for the assessee requires to be rejected.

(13) Now, coming to the first issue, the provisions of sub-section (2) of Section 5 of the Act requires to be noticed. The said section reads as under:

> "5. **Levy of tax on sale or purchase of goods:-**
>
> xxx xxx
>
> (2) Notwithstanding anything contained in this Act, in respect of manufactured goods other than tea, which are sold under a trade mark or brand name, the sale by the brand name holder or the trade mark holder within the State shall be the first sale for the purposes of this Act."

(14) Sub-section (2) of Section 5 of the Act is a deeming provision. Under the said provision the Legislature has envisaged that if a brand name holder or a trade mark holder effects sales of manufactured goods other than tea within the State, such a sale shall be first sale in the State for the purposes of the Act.

(15) The vires of sub-section (2) of Section 5 of the Act came up for

consideration before a Bench of this Court in the case of *Bechu & Company and others* v. *Assistant Commissioner (Assessment), Special Circle-I, Kozhikode and others* [(2003) 132 STC 68].

(16) This Court while dealing with the aforesaid provision, has stated as under:

> "Section 5(2), which deems the sale of manufactured goods other than tea under a trade mark or brand name by the trade mark holder or the brand name holder as the first sale for the purpose of the Act, is not a separate charging section, it merely says what the first point of sale in respect of the goods specified therein is. "

(17) At paragraph 31 of the judgment, the Court has further stated as under:

> "31. Now we will deal with the contention of Sri.Arshad Hidayathullah, learned Senior Counsel for the petitioner in O.P.No.1144 of 2002 that the word "holder" used in sub-sections (2), (2A) and (2B) of Section 5 must be understood as registered trade mark holders or registered brand name holders as otherwise the legislation will be hit by article 14 of the Constitution. The counsel has relied on the dictionary meaning of the word "holder" used in section 5(2), 5(2A) and 5(2B) of the Act and submitted that going by the meaning of the word "holder" the person who holds the trade mark or brand name must have ownership over the trade mark or brand name and that such ownership over a trade mark or a brand name can be obtained only if the trade mark or brand name is registered under the Trade and Merchandise Marks Act. The further submission of the Senior Counsel is that when the Legislature has used the expression brand name holder or trade mark holder it must be understood as referring to a brand name or a trade mark registered under the Act mentioned above. It is also his submission that unless the expressions "trade mark holder" or "brand name holder" used in sub-sections (2), (2A) and (2B) of section 5 are understood in such a manner the said provisions cannot be sustained. It is to buttress the said argument the Senior Counsel relied on the decisions of the Supreme Court in regard to the interpretation of statute. Of course the meaning of the word "holder" in Collins Cobuild English Dictionary for advanced Learners Major New Edn. (3rd Edn. 2001) is "some one who owns or has something". The word "holder" in Webster's Third New International

Dictionary means, “one that holds something: as a (1) possessor, owner-often used in combination”. In this context it must be noted that when a person uses a particular brand name or trade name for his product, ordinarily he has got the ownership over the said brand name or trade name. It is only when it comes to the question of infringement of the trade mark or brand name used by such person a situation may arise as to whether such person can seek relief against the person who is responsible for such infringement. It is in that context the relevance of the Trade and Merchandise Marks Act arises. As the Special Government Pleader has pointed out any person can do business by using a trade mark or a brand name for which there is no legal impediment. This is also recognised by the Trade and Merchandise Marks Act. It is in that context the relevance of the definition of “trade mark” and the provisions of section 27 of the Trade and Merchandise Marks Act occurs. There is no inhibition under the said Act for the user of a trade mark or brand name by unregistered trade mark holders or brand name holders. Section 27 of the said Act only states that no person shall be entitled to file or institute any proceedings to prevent or to recover damages for the infringement of an unregistered trade mark. An unregistered trade mark holder is also the owner of the trade mark which was but the registration grants exclusive right to the registered proprietor of the trade mark to use such trade mark. However, this section does not preclude an action against any person for passing off goods as the goods of another person or the remedies in respect thereof. If under law there is no inhibition in a person using a trade mark or brand name for his products even without registration of the trade mark or brand name under the Trade and Merchandise Marks Act when the Legislature uses the expression “trade mark holder” or “brand name holder” it is not possible to say that the legislative intention is that the expression “trade mark holder” or “brand name holder” only mean registered trade mark holder or registered brand name holder. If such an interpretation is placed that will amount to rewriting the section by adding words which were not in the section. It is settled that interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed: it cannot import provisions in the statutes so as to supply any assumed deficiency [Commissioner of Sales Tax v. Modi Sugar Mills Ltd. (1961) 12 STC 182 (SC); AIR 1961 SC 1047]. It is

> relevant in this context to note that wherever Legislature wanted to refer to registered trade mark/brand name holders they have said so, as is evident from entry 105 of the First Schedule to the Act – Pappad, appalam and similar other items by whatever name called, sold under brand name registered under the Trade and Merchandise Marks Act, 1958:"

(18) In the instant case, the petitioner who is a dealer in bakery products, purchases the bakery products from "Appu's Bakers', Nanthencode. After such purchase wraps them in a polythene cover. At the time of hearing of this revision petition, learned counsel Sri.Shamsudheen, has produced before us the polythene cover which is used for the purpose of packing the bakery products and effecting sale of the said products. A perusal of the polythene cover produced by Mr.Shamsudheen would clearly indicate that the dealer has put a brand name as 'SB' and below that logo has put his shop's name as Shaju Bakery and thereafter the product contained in the polythene packet is also indicated. All these would clearly demonstrate that the petitioner is not a mere second seller of the bakery products which he has purchased from 'Appu's Bakers', Nanthencode.

(19) In the instant case, after the bakery products are purchased, the petitioner wraps them/covers them with a polythene cover which would indicate the brand name and also the product which is sold in the polythene cover.

(20) Under the Act, a second seller of specified scheduled goods is exempted from payment of the sales tax. Sub-section (2) of Section 5 of the Act carves out an exception. The exception is, if a manufactured goods like a bakery product other than tea is sold under a brand name or a trade mark, the brand name holder or the trade mark holder within the State will be the first seller in the State for the purposes of the Act.

(21) In the instant case, as we have already stated, the petitioner by using a printed polythene cover which has got a logo and the products name would clearly demonstrate that the petitioner is a brand name holder and the sales effected by him is not exempt on the ground that it is not a second sale for the purpose of the Act.

(22) In view of the above, we are of the opinion that neither the assessing authority nor the Tribunal has committed any error whatsoever on a question of law which would call for our interference in this revision petition. Therefore this revision petition requires to be rejected and the question of law framed by the assessee requires to be answered against the assessee and in favour of the revenue. Accordingly, we pass the following:

Order

i) The revision petition is rejected.

ii) The questions of law framed by the assessee are answered against the assessee and in favour of the revenue.

Consequently, C.M.P.No.6506 of 2002 is dismissed.

Ordered accordingly.

(**H.L.DATTU)**
CHIEF JUSTICE

(K.T.SANKARAN)
JUDGE

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